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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MICHAEL McMURTRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the indictment did not charge and neither jury nor judge found beyond a reasonable doubt the essential facts under the Armed Career Criminal Act, 18 U.S.C. § 924(e), could a sentencing court properly apply that Act's higher maximum sentence and its mandatory minimum sentence against a felon in possession of a firearm?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Michael McMurtry, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit, entered in his case on November 27, 2001.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit, for which review is sought, is *United States v. McMurtry*, No. 01-2157 (7th Cir. November 27, 2001) (unpublished) (Appendix A). The oral ruling of the district court is set out in Appendix B to this Brief.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the unpublished order issued on November 27, 2001, by the United States Court of Appeals for the Seventh Circuit. This Court has jurisdiction to review that judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, . . . , and to be informed of the nature and the cause of the accusation; . . . "

STATUTORY PROVISIONS INVOLVED

The full provisions of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e)(1) in effect on the date Petitioner's offense was alleged to have occurred are set out in Appendix C to this Brief.

STATEMENT OF THE CASE

On August 24, 2000, Michael McMurtry was indicted on a single count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). That offense carries a maximum sentence of ten years in prison. On December 8, 2000, a jury convicted McMurtry on that one count.

After McMurtry's conviction, the probation office filed a pre-sentence report on January 29, 2001. The pre-sentence report recommended that the court apply the Armed Career Criminal Act, 18 U.S.C. § 924(e), to McMurtry. Section 924(e) added a 15-year minimum mandatory sentence and raised the statutory maximum sentence to life in prison. Further, with the application of 18 U.S.C. § 924(e), McMurtry's sentencing guideline range was 235 to 293 months, or 19 years and 7 months to 24

years and 5 months. That range more than doubled the ten-year imprisonment maximum sentence allowed for a felon in possession of a firearm violation under 18 U.S.C. § 922(g)(1).

Before sentencing, McMurtry objected to the application of the Armed Career Criminal Act because it was not alleged in the indictment and not proven to the jury beyond a reasonable doubt, contrary to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The district court ruled that *Apprendi* did not apply, sentenced him as an armed career criminal under 18 U.S.C. § 924(e), and imposed 235 months in prison.

The Seventh Circuit affirmed McMurtry's sentence, stating that "*Apprendi* does not overrule the holding of *Almendarez-Torres* . . . that penalty enhancements based on recidivism need not be established beyond a reasonable doubt."

McMurtry now seeks review of the Seventh Circuit's order affirming the district court's imposition of a sentence in excess of the statutory maximum of ten years. McMurtry challenges the Seventh Circuit's holding that *Apprendi* does not require the elements of 18 U.S.C. § 924(e) to be submitted to the jury or proved beyond a reasonable doubt.

REASONS FOR GRANTING THE WRIT

In the landmark case *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held that any essential fact, other than a prior conviction, that increases a statutory

maximum sentence is an element to be pleaded and proved to the trier of fact beyond a reasonable doubt. In so holding, the Court has come almost full circle, from requiring all facts that affect the punishment and stigma associated with a criminal conviction to be included in the indictment and proved to a jury beyond a reasonable doubt;[1] to a requirement that only those facts identified by the legislature as elements be pled and proved beyond a reasonable doubt;[2] to a holding that any fact that authorizes or increases punishment must be submitted to the jury and proved beyond a reasonable doubt.[3] Despite this Court's return to its previous understanding of the requirements of the due process and jury trial clauses, *Apprendi* preserved the holding of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which relegated recidivism to the status of a sentencing factor.

Whether the holding of *Almendarez-Torres* is limited to the facts of that case remain unresolved. This case presents a good factual situation for resolution of that issue. This case also presents the opportunity to resolve the issue of whether a fact, including a prior conviction, that increases the mandatory minimum punishment to which a criminal defendant is exposed should be considered an element of the offense under *Apprendi*. The Court recently granted certiorari in *United States v. Harris*, 243 F.3d 806 (4th Cir.), *cert. granted*, 122 S. Ct. 663 (2001), to address whether *Apprendi* applies to increases in mandatory minimum sentences.

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[1] *In re Winship*, 397 U.S. 358, 364 (1970).

[2] *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986).

[3] *Jones v. United States*, 526 U.S. 227, 232 (1999).

I. The Provisions of 18 U.S.C. § 924(e) Substantially Increased McMurtry's Maximum Sentence and Therefore Should Have Been Pled in the Indictment and Proved to the Jury Beyond a Reasonable Doubt.

A. *Almendarez-Torres* Does Not Control This Case.

1. In *Almendarez-Torres*, this Court held that under 18 U.S.C. § 1326, a defendant's prior conviction is a sentencing factor, rather than an element of the offense. *Almendarez-Torres*, 523 U.S. at 235. This Court further held that, as a constitutional matter, a prior conviction need not be an element of the offense, even if it increases the maximum statutory punishment. *Id.* at 239-47. *Almendarez-Torres'* constitutional ruling, however, has been expressly limited by *Apprendi* and its vitality called into doubt.

The majority opinion in *Apprendi* stated that *Almendarez-Torres* "represents at best an exceptional departure from the historic practice" of requiring that every fact that increases the maximum punishment be treated as an element of the offense. *Apprendi*, 530 U.S. at 488. The Court described *Almendarez-Torres* "as a narrow exception to the general rule," a rule based on "the otherwise uniform course of decision during the entire history of our jurisprudence." *Id.* at 489.

The majority opinion in *Apprendi* also stated that in *Almendarez-Torres* "the specific question decided concerned the sufficiency of the indictment." *Id.* at 488. *Apprendi* made clear that the fact that defendant in *Almendarez-Torres* did not contest his prior conviction was significant. The right to jury trial and proper standard of proof was therefore not at issue in *Almendarez-Torres*. That

the defendant in *Almendarez-Torres* pled guilty to having been previously convicted of an aggravated felony "mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a fact increasing punishment beyond the maximum of the statutory range." *Id.* at 488.

2. Here, McMurtry was charged by indictment with being a felon in possession of a firearm. The Grand Jury specifically charged that:

> On or about August 7, 2000, in the Eastern District and State of Wisconsin, Michael McMurtry, defendant herein, having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm , to wit: a Smith and Wesson, model 469, semiautomatic 9mm with serial No. TAC4780, which had prior to his possession been transported in interstate commerce, and the possession of which was therefore in and affecting commerce, all in violation of Title 18, United States Code § 922(g)(1).

The indictment did not allege a violation 18 U.S.C. § 924(e).

Unlike the defendant in *Almendarez-Torres*, McMurtry exercised his right to a jury trial. McMurtry did not admit at trial to three prior violent felonies occurring on occasions different from one another. Furthermore, the government did not prove beyond a reasonable doubt to the jury those additional facts.

3. The Seventh Circuit's ruling that the Armed Career Criminal Act includes no elements of an offense, but merely provides sentencing factors, is contrary to

Apprendi. The *Apprendi* Court said that it does not matter how the required finding is labeled, it only matters whether it exposes the defendant to a greater punishment than that authorized by the jury's verdict (as does the Armed Career Criminal Act here). *Id.* at 494. McMurtry's maximum time of incarceration increased significantly (from ten years to life) with the application of the armed career criminal statute. The facts that did that should be elements of the crime to be charged and proven to a jury beyond a reasonable doubt. As *Apprendi* makes clear, the maximum sentence may not be increased by a judicial finding, a presentence report, or a prosecutor's urging as occurred here.

McMurtry notes, too, that the Armed Career Criminal Act goes beyond the pure issue of recidivism. The Armed Career Criminal Act requires more than only prior convictions; 18 U.S.C. § 924(e)(1) requires three previous convictions of a violent felony or serious drug offense committed on occasions different from one another. The terms "violent felony" and "serious drug offense" in turn have very particular statutory definitions. *See* 18 U.S.C. § 924(e)(2)(A), (B). These additional facts constitute additional elements of the offense of possession of a firearm by a convicted felon, as an armed career criminal, that must be alleged in the indictment and proved to the jury beyond a reasonable doubt. That is especially true of the "occasions different from one another" element, which certainly goes beyond *Almendarez-Torres* itself. Not only did McMurtry not admit the fact of his prior convictions, he also did not admit these additional elements.

B. If it Applies Here, *Almendarez-Torres* Should Be Overruled.

1. If this Court does not find that *Apprendi's* limitation of *Almendarez-Torres* distinguishes it from this case, then this Court should consider whether *Almendarez-Torres* still can stand. The majority of this Court in *Apprendi* found it "arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested. . . . " but found it unnecessary to revisit the case's holding in reaching its decision. *Apprendi*, 530 U.S. at 489-90.

Moreover, five justices of this Court now have written or joined opinions disagreeing with *Almendarez-Torres'* constitutional reasoning. *See Monge v. California*, 524 U.S. 721, 741 (1998) (Scalia, J., dissenting, joined by Souter and Ginsburg, JJ.) (*Almendarez-Torres'* holding was "a grave constitutional error affecting the most fundamental of rights"); *Jones v. United States*, 526 U.S. 227, 252 (1999) (Stevens, J., concurring) (agreeing with Justice Scalia that, contrary to *Almendarez-Torres'* holding, "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties"); *Apprendi*, 530 U.S. at 490 (Thomas, J., concurring) (stating that he "succumbed" to the errors of *Almendarez-Torres* in joining that opinion). Thus, within two years after the decision was announced, a majority of this Court repudiated *Almendarez-Torres*. That decision no longer commands a majority's confidence, and should be overruled or limited expressly to its narrow facts.

2. More specifically, the holding of *Almendarez-Torres* that criminal history or recidivism is always a sentencing factor that need not be pled and proven beyond a reasonable doubt is overbroad and should not be followed by this Court. Even if recidivism is a "traditional" sentencing factor, it also can be an element of an offense. Model Penal Code § 2.02, cmt. 1 (1985) recognizes that offense elements fall into three basic categories of fact: conduct, results, and attendant circumstances. Attendant circumstances include features of the offender or victim, such as age in the offense of statutory rape or identity in all criminal cases.

Criminal history likewise is an attendant circumstance. For example, in a charge of felon in possession of a firearm, criminal history – the fact of having a felony conviction – is an attendant circumstance. In a felon-in-possession case, the fact of recidivism is not part of the sentencing decision; it is an element of the offense. *See Old Chief v. United States*, 519 U.S. 172, 174 (1997).

Arguably, Congress decided that having three previous violent felonies or serious drug offenses "occurring on occasions different from one another" was an attendant circumstance to possessing a firearm that warrants a substantially higher sentence. In other words, possessing a firearm under those circumstances is a more serious crime. Thus, the facts in 18 U.S.C. § 924(e) are part of the commission of a particular offense. Those facts should be pled in the indictment and proven to a jury before these higher penalties are meted out.

3. Further, the spirit and lessons of *Apprendi* support overruling *Almendarez-Torres*. First, *Apprendi* places

substance above form: "The relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494. Consequently, labeling the Armed Career Criminal Act a sentencing factor is not dispositive.

Second, *Apprendi* advances a profound, democratic principle that important decisions which increase the range of prescribed penalties should be made by a defendant's fellow citizens, a jury, rather than by a judge. The only way to ensure that it is the jury, and not the judge, is simply to allege those facts in the indictment and prove them to the jury beyond a reasonable doubt.

4. While the principle of *stare decisis* sometimes sustains a decision that was arguably incorrect, this rule should not be applied here. "Stare decisis is not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). "[R]ather, it is a principle of policy and not a mechanical formula of adherence to the latest decision." *Id.* at 828, quoting *Helvering v. Hallock*, 306 U.S. 106, 119 (1940). This Court has not "felt constrained to follow precedent" that is "badly reasoned." *Id.* at 827. This is especially true when, as in this instance, the incorrect precedent is of very recent vintage, *cf. id.* at 830 n.2 (overruling two- and four-year old decisions); involves "procedural and evidentiary rules" rather than property and contract rights, *id.* at 828; was "decided by the narrowest of margins, over spirited dissents," *id.* at 829; has

been "questioned by Members of the Court in later decisions," *id.* at 829-830; and has "defied consistent application by the lower courts." *Id.* at 830.[4]

True, in most matters "it is more important that the applicable rule of law be settled than it be settled right." *Payne*, 501 U.S. at 827, quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). But as in *Payne* itself, that is not the case here.

II. Because the Facts of § 924(e) Trigger a Mandatory Minimum Sentence They Should Be Alleged in the Indictment and Proven to a Jury Beyond a Reasonable Doubt.

1. The jury convicted McMurtry only of being a felon in possession of a firearm. That crime carries a maximum sentence of ten years and no mandatory minimum sentence. Applying the Armed Career Criminal Act not only raised the maximum penalty, but also raised the mandatory minimum penalty. The statutory maximum became life; the mandatory minimum, 15 years.

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[4] Prosecutors and defendants around the country have tried to bargain their way around the *Almendarez-Torres* holding. *See, e.g., United States v. Romero-Tamayo*, 212 F.3d 729, 732 (2d Cir. 2000) (considering plea bargain that treated §§ 1326(a) and (b)(2) as separate crimes, despite holding in *Almendarez-Torres*); *United States v. Banuelos-Rodriguez*, 173 F.3d 741, 742-43 (9th Cir. 1999), *overruled on other grounds en banc*, 215 F.3d 969, 970-71 (9th Cir. 2000) (noting similar pre-*Almendarez-Torres* practice in three of four California federal districts); *United States v. Bonnet-Grullon*, 212 F.3d 692 (2d Cir. 2000) (describing bargain practices used in Southern District of California to avoid consequences of *Almendarez-Torres*).

2. Justice Stevens, in his concurring opinion in *Jones v. United States*, 526 U.S. 227, 253 (1999), stated that "a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence. . . . " Likewise, Justice Thomas stated in *Apprendi* that, "If a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element." 530 U.S. at 521 (Thomas, J., concurring). Justice Thomas further explained that this "common-law rule would cover the *McMillan* situation of a mandatory minimum sentence." *Id.* He stated:

> No doubt a defendant could, under such a scheme, find himself sentenced to the same term to which he could have been sentenced absent the mandatory minimum. . . . But it is equally true that his expected punishment has increased as a result of the narrowed range and that the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum "entitl[es] the government," [citation omitted], to more than it would otherwise be entitled. . . . Thus, the fact triggering the mandatory minimum is part of "the punishment sought to be inflicted," [citation omitted]; it undoubtedly "enters into the punishment" so as to aggravate it, [citation omitted], and is an "ac[t] to which the law affixes . . . punishment," [citation omitted].

530 U.S. at 521-22 (Thomas, J., concurring).

3. The Sixth Circuit has applied the holding of *Apprendi* to mandatory minimum sentences. In *United States v. Flowal*, 234 F.3d 932, 936 (6th Cir. 2001), the Court

applied *Apprendi* to 21 U.S.C. § 841(a)(1), holding that facts that subjected the defendant to a mandatory minimum of life in prison had to be submitted to the jury and proved beyond a reasonable doubt.

The First, Fourth, Fifth, Seventh and Eighth Circuits have held to the contrary. *See United States v. Robinson*, 241 F.3d 115, 122 (1st Cir. 2001) ("*McMillan* clearly allows a fact that triggers a mandatory minimum sentence to be found by a judge using a preponderance-of-the-evidence standard as long as the mandatory minimum does not exceed the otherwise-applicable statutory maximum. . . . "); *United States v. Harris*, 243 F.3d 806, 809 (4th Cir. 2001) (declining to extend *Apprendi* holding to statutory minimums); *United States v. Keith*, 230 F.3d 784, 787 (5th Cir. 2000) (per curiam), *cert. denied*, 121 S. Ct. 1163 (2001) ("[W]e hold that a fact used in sentencing that does not increase a penalty beyond the statutory maximum need not be alleged in the indictment and proved to a jury beyond a reasonable doubt"); *United States v. Smith*, 223 F.3d 554, 565-66 (7th Cir. 2000) (increase in statutory minimum authorized by 21 U.S.C. § 848 is not increased punishment triggered by *Apprendi*); and *United States v. Aguayo-Delgado*, 220 F.3d 926, 934 (8th Cir.), *cert. denied*, 121 S. Ct. 600 (2000) ("Those [statutory] minimums, because they are within the statutory range authorized by § 841(b)(1)(C) without reference to drug quantity, are permissible under *Apprendi* and *McMillan* even where the drug quantity was not charged in the indictment or found by the jury. . . . "). In the interest of judicial consistency, the Court should resolve this split in circuit law.

Admittedly, the Sixth Circuit case, *Flowal,* did not involve recidivism. But the rationale for applying *Apprendi* to mandatory minimums is as compelling for recidivism as for any other fact that entitles the government to more punishment than it otherwise could seek. When a maximum sentence increases, it only increases the possibility of a higher sentence. A mandatory minimum sentence, however, is not a mere possibility – it is a certainty. Here, applying § 924(e) guarantees a defendant at least a 15-year sentence, necessarily exceeding the previous worst-case outcome of a ten-year maximum sentence. Moreover, unlike § 924(c), at issue in the *Harris* case, and other mandatory minimum statutes that enhance existing minimum penalties by proof of additional facts, the Armed Career Criminal Act raises the penalty for being a felon in possession of a firearm from no mandatory minimum to a 15-year mandatory minimum. The certainty of the substantial increase from zero to 15 may be a more compelling argument for requiring the jury to find beyond a reasonable doubt the facts supporting the increase, than the argument when only a maximum sentence rises.

CONCLUSION

For the foregoing reasons, Michael McMurtry requests that this Court grant a writ of certiorari to review the judgment and opinion that the United States Court of Appeals for the Seventh Circuit entered on November 27, 2001.

Respectfully submitted,

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APPENDIX A

This case was not selected for publication in the Federal Reporter

UNPUBLISHED ORDER

Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued November 5, 2001
Decided November 27, 2001

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Richard A. Posner, *Circuit Judge*

Hon. Kenneth F. Ripple, *Circuit Judge*

No. 01-2157

United States of America,
Plaintiff-Appellee,

v.

Michael McMurtry,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin

No. 00 CR 161

Charles N. Clevert,
Judge.

ORDER

In December of 2000, Michael McMurtry was tried and convicted as a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e), the district court assessed an additional penalty and sentenced him to a

total of 235 months in prison. McMurtry now appeals, claiming the district court gave an improper jury instruction on the statutory term "firearm" which prevented a unanimous jury verdict, and that the imposition of additional penalties provided for in the Armed Career Criminal Act, 18 U.S.C. § 924(e), violated the Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because they were not submitted to the jury and proved beyond a reasonable doubt. Because the issues McMurtry presents for review have been previously foreclosed by this court, we affirm.

A. Jury Instruction

Jury instructions are reviewed *de novo*, with substantial discretion given to the district court's chosen, precise wording of a particular instruction, so long as it accurately and completely states the law. *Savino v. C.P. Hall Co.*, 199 F.3d 925, 934 (7th Cir. 1999). The government asserts review is for plain error because McMurtry failed to object to the instruction. *E.g., United States v. Durman*, 30 F.3d 803, 810 (7th Cir. 1994). McMurtry asserts that he did object, and according to the facts in the government's brief, it appears that McMurtry objected to the jury instructions several times on the grounds that certain language be added. Moreover, even after the district court added the language, McMurtry again objected to the instruction as being unconstitutional on its face as applied to him, claiming the instruction contained contradictory disjunctive clauses. We can discern no distinction between the trial objection and the argument on appeal; however the standard of review is of little consequence

because under either standard the instruction was permissible.

McMurtry claims that the jury instruction allowed the jury to render a non-unanimous verdict. The term "firearm," as defined in § 921(a)(3), has multiple definitions, and the jury instruction essentially mimicked the relevant ones. Section 921(a)(3) defines a "firearm" as:

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm. 18 U.S.C. § 921(a)(3).

The jury was instructed that a firearm:

> as defined in Title 18 U.S.C. § 921(a)(3), a firearm means: any weapon which will expel a projectile by the action of an explosive; or any weapon which is designed to expel a projectile by the action of an explosive; or any weapon which may be readily converted to expel a projectile by the action of an explosive; or the frame or receiver of such weapon.

McMurtry asserts that the instruction should have specified which of the definitions the jury found him to have violated. He further contends that by not separating the three definitions in subsection (A), some members of the jury might have agreed that he violated one definition, while others found he violated another, producing a non-unanimous verdict.

The 9mm Smith & Wesson semi-automatic handgun McMurtry possessed was operable, but not fully. An ATF special agent test fired the weapon and apparently could not get the gun's magazine to feed the firing chamber. However, the agent was able to fire the weapon by loading a primer round into the chamber and manually working the action so the slide moved forward and discharged the round, but the weapon did not eject the round as it should have. According to the government, the gun did not eject the round because a primer round was used; though the agent testified that the gun was designed to expel a projectile.

Consistent with the instruction and statutory definition, the jury could have found that the gun was a "firearm" by determining it was: (1) a "weapon (including a starter gun) which will . . . expel a projectile by the action of an explosive;" (2) a "weapon (including a starter gun) which . . . is designed to . . . expel a projectile by the action of an explosive;" or (3) a "weapon (including a starter gun) which . . . may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3)(A). This issue was disputed at trial and based on the facts outlined above, McMurtry argued that the gun did not expel a projectile and thus did not meet the first definition, and that it was malfunctioning and broken so it was not "readily [ ] converted" under the third definition. On appeal McMurtry argues that the instruction prevented him from preparing a defense, relieved the prosecution of its burden, and allowed the jury to disagree on this element of the offense.

The Supreme Court and this circuit have repeatedly held that where there are several acts upon which a jury

could convict, a general instruction listing all of the possible acts under which the jury can convict is permissible. *See, e.g., Griffin v. United States*, 502 U.S. 46, 49-52 (1991) (holding that the rule "that a general jury verdict was valid so long [as] it was legally supportable on one of the submitted grounds . . . [is] also applied to the analogous situation at issue here: a general jury verdict under a *single* count charging the commission of an offense by two or more means") (emphasis in original); *United States v. Durman*, 30 F.3d 803, 809-10 (7th Cir. 1994) ("Where the relevant statute lists alternative means of violation, the 'general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any of the acts charged.' ") (quoting *United States v. Cusumano*, 943 F.3d 305, 311 (3rd Cir. 1991).

B. McMurtry's Sentence

McMurtry challenges his sentence of 235 months because the jury convicted him only of violating 18 U.S.C. § 922(g)(1), which carried a penalty of only 120 months, while the judge assessed an additional 115 months pursuant to 18 U.S.C. § 924(e). We review the application of a federal statute *de novo*. *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 860 (7th Cir. 1998); *cf. U.S. v. Valenti*, 121 F.3d 327, 334 (7th Cir. 1997). The government contends that McMurtry failed to object to the disclosure of the prior convictions, thus we should review for plain error. *United States v. Skidmore*, 254 F.3d 635, 641 (7th Cir. 2001). McMurtry contests the government's characterization,

which is important to his argument that *Apprendi's* holding warrants reversal in this case. Regardless, the argument over the standard of review is academic, for under either standard the result is the same.

McMurtry asserts that under *Apprendi,* he should have been charged with violating 18 U.S.C. § 924(e) in the indictment, the issue should have been submitted to the jury, and the statute's elements proved beyond a reasonable doubt. *Apprendi,* 530 U.S. at 489-90 (" '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.' "). McMurtry argues that *Apprendi,* while upholding *Almendarez-Torres v. United States,* 523 U.S. 224, 230 (1998), only excludes prior convictions that were admitted by the defendant from due process and Sixth Amendment strictures and not contested issues of fact. *Apprendi,* 530 U.S. at 488-90 (narrowing *Almendarez-Torres* as applying only to its "unique facts"); *Almendarez-Torres,* 523 U.S. at 247-48 (expressing "no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence" because defendant admitted the prior convictions). According to McMurtry's recitation of the facts, he never admitted to the prior convictions, therefore, the elements of § 924(e) should have been charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt. The government responds that McMurtry did not contest the presentence report, and that the Supreme Court's holdings in *Apprendi* and *Almendarez-Torres* and our holding in *Skidmore* have rejected the argument that prior convictions, which are the basis for sentencing

enhancements, must be submitted to a jury and proved beyond reasonable doubt.

McMurtry argues that because he was not indicted for a violation [of] § 924(e), he was not given notice of the charges, and was sentenced for an offense he was not convicted of violating. The legal and factual analogy to *Apprendi* is that a separate statute, not a statutory subsection or the sentencing guidelines, increased the penalty McMurtry faced. Apprendi's punishment was increased substantially by a statute wholly separate from the one he was charged with and convicted under, while in *Almendarez-Torres* the added penalty was included in a subsection of the statute Almendarez-Torres was charged with violating. *Apprendi*, 530 U.S. at 468-69, 476 ("As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the *two acts* that New Jersey has singled out for punishment.") (emphasis added); *Almendarez-Torres*, 523 U.S. at 228-30 (reviewing the statute to determine if Congress intended to create a separate crime or a sentencing factor); *cf. id.* at 249 (Scalia, J., dissenting) (finding that "[t]he text of the statute supports . . . the conclusion that subsection (b)(2) is a separate offense"). While the Court has not yet confronted this precise issue, in *Almendarez-Torres* it viewed prior convictions as sentencing factors under the rubric of recidivism. *Id.* at 230 (viewing prior convictions as sentencing factors because the conduct in question, prior crimes, were not independently unlawful or part of the predicate offense, therefore, the consideration of past conduct was used only in determining a penalty for the unlawful act at issue).

McMurtry also argues that a conviction under § 924(e) requires proof of specific additional facts beyond the simple fact that he was previously convicted. His claim is that the characterization of the previous felony convictions as "violent" or "serious drug offenses," and the fact that they had to be committed on different occasions indicates that § 924(e) creates a separate offense from that of § 922(g)(1). For example, in contrast to the Sentencing Guidelines, § 924(e) is very specific as to what type of convictions will suffice to increase the penalty. *See* 18 U.S.C. § 924(e); U.S.S.G. § 4A1.1 (providing for additional points if the prior offense resulted in "imprisonment exceeding one year and one month" or "at least sixty days"); *see also Apprendi*, 530 U.S. at 482-85 ("But practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a *statutory offense*, and proving those facts beyond reasonable doubt.") (emphasis added). This argument brings us full circle, back to McMurtry's assertion that § 924(e) is a completely separate statutory offense, which should be submitted to the finder of fact and proved beyond a reasonable doubt, and not later determined by a judge in the penalty phase. *See id.* 474-85 & n.10 ("Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense.").

However, McMurtry's challenge must fail because we recently addressed the same issue and determined *Apprendi* does not require § 924(e)'s elements be charged, submitted to the jury, or proved beyond a reasonable doubt. *United States v. Skidmore*, 254 F.3d 635, 642 (7th Cir.

2001). In that case, we reasoned that "*Apprendi* does not overrule the holding of *Almendarez-Torres* . . . that penalty enhancements based on recidivism need not be established beyond a reasonable doubt." *Id.* That is a logical interpretation of the holdings of *Apprendi* and *Almendarez-Torres* and it is the law of this circuit, and until the Supreme Court decides to revisit and expand *Apprendi*, we are bound to uphold it. AFFIRMED.

APPENDIX B

[1] IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 00-CR-161

MICHAEL MCMURTRY,

Defendant.

JUDGE CHARLES CLEVERT, JUDGE PRESIDING

Friday, April 20, 2001

9:15 a.m.

* * *

[20] MS. JOSEPH: Your Honor, I am assuming from your statement you are likewise denying the legal challenges to [21] the armed career criminal that's been unconstitutional.

THE COURT: Yes.

MS. JOSEPH: On Apprendi as well as my argument that he is disproportionate to the defense.

THE COURT: Yes, I am. The Court did not acknowledge that and thank you for raising that point. Yes, the Court is rejecting the defense argument.

I do not see on the basis of what you have asserted in your submission how Apprendi would apply. If you want to be heard on that point, I'm certainly willing to listen.

MS. JOSEPH: Your Honor, as I discussed in my memorandum, there is the – except for prior record for prior conviction as part of Apprendi's holding but I also assert that Apprendi, Your Honor, must be read in connection with Almendarez-Torres which is where that prior conviction exception came from and it is clear from reading Apprendi that Apprendi – the Court in a Supreme Court in Apprendi limited Almendarez-Torres to its specific facts.

The fact that the defendant Almendarez-Torres did not go to trial stipulated to the prior convictions limiting to that fact in this case Mr. McMurtry did go to trial.

He did not stipulate to the predicate offenses of armed robberies and the other felony that would bring him [22] into armed career criminal that can be distinguished that way. I'm not asking the Court to overrule Almendarez-Torres. The Court cannot do that.

What I am asking the Court to do is to read Apprendi the way it was written that it limited Almendarez-Torres and limited prior convictions I would say to cases where the defendant stipulated to those facts.

In light of the tremendous – the enhancement that armed career criminal brings the defendant was not charged with it, was not put on an indictment, it was not suited to the jury.

I think probation noted that the defendant had notice of it because it was a footnote in one of the bond studies that this defendant may be an armed career criminal. I don't think that is enough from what the U.S. Supreme Court is telling us that is required for due process.

So for those reasons I believe Apprendi is applicable here.

THE COURT: Ms. Lawrence.

MS. LAWRENCE: Your Honor, I think Apprendi does lay out an exception in that the predicate offenses for in this case the armed career criminal act need not be pled in the indictment.

There is certainly dicta in Apprendi that [23] indicates that exception may at a later date by a different court be considered but at this point I think that the defendant did have notice and that Apprendi – the exception to Apprendi applies in this case and that the defendant's arguments failed in that vain.

THE COURT: I'll tell you what. Let's take a brief recess. I believe there's another case that might be helpful and I want to take the opportunity to look at it if I can find it very quickly. Take a brief recess and I'll share that with you momentarily if I can find it.

(Discussion off the record.)

(Recess taken.)

THE COURT: During our recess I had an opportunity to pull several cases and we've been provided with copies of those cases.

I do note that if you go directly to the Apprendi decision which is 120 Supreme Court 2348 at page – pages 2362 through 2363 the Supreme Court wrote the following.

In summary, exemption of our cases in this area and of the history upon which they rely confirms the opinion

we express in Jones other than the fact of a prior conviction any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

I note that in the Apprendi decision the Supreme [24] Court excluded situations such as this by saying and I reiterate other than the fact of a prior conviction. Here it is the fact of prior convictions that gives rise to enhancement.

And so by virtue of the precise language in Apprendi, it would appear that the argument upon which the defense is resting its assertion that no armed career criminal enhancement is warranted here does not have vitality.

I believe that the other opinions from outside the 7th Circuit's opinion as well as the 10th Circuit opinion that I gave to you would support the conclusion that this court is reaching here.

And I know that the Court has provided you with United States vs. Rogers, 2001 West Law 355, 620 an April 5, 2001 decision out of the 7th Circuit and United States vs. Dorris, D-O-R-R-I-S, 236 Fed 2d., 582 a December 2000 decision out of the 10th Circuit.

If you would like to be heard on those cases or the Court's finding, I'll entertain some additional comment.

MS. JOSEPH: Just briefly, Your Honor, I only have the cases you just provided us, Rogers and Mack or I'll only address my comments to those two. Of course I didn't have a chance to read them in details. But reading [25] Rogers, I believe Rogers is distinguished from the case here.

THE COURT: I'm sorry, I did give you Mack, that's 229 Fed. 3d. 226 and in particular footnote seven on page 12 of that decision.

MS. JOSEPH: May I continue, Your Honor?

THE COURT: Yes.

MS. JOSEPH: The distinction I see with Rogers, Your Honor, is that in Rogers the drug pointing triggered a mandatory minimum and I think that decision says that was not an element of the offense because it was the mandatory minimum not beyond the maximum. That's the distinction here.

The armed career criminal not only does it trigger a mandatory minimum of 15 years, my argument in this case is that mandatory minimum 15 years goes beyond the maximum of 10 years on which that the jury found him guilty.

He was found guilty of being a felon in possession of a firearm that carries a maximum of 10 years and the armed career criminal starts at 15 years. So Apprendi applies because it goes beyond the maximum notwithstanding the comments you already made about the prior conviction part of Apprendi, I believe that I had addressed that in my written memorandum.

[26] I also want to add that Apprendi also talks about that it's the fact that's important not just the form though we may label ACC, Armed Career Criminal as an enhancement but the effect, Your Honor, is that this man today is facing a mandatory minimum of 15 years, that is not what the jury found him guilty on.

In I guess the brief look I had of Mack it seems Mack the defendant got more notice than Mr. McMurtry did in this case. I think in Mack the defendant, the government had a pretrial motion that would be facing an armed career criminal, if I'm reading it correctly.

In this case the notice that the government had given was that in the bond study given during pretrial there's a footnote at the bottom of the bond study saying that armed career offender, not even armed career offender or armed career criminal offender applies. I think that's the occurring that is not notice that it may apply to you.

It doesn't tell you what you're facing. It doesn't give the defendant notice and information upon which he can make informed decisions so that's the distinction there.

But Apprendi goes beyond just the form of the indictment, also goes to the right of the defendant to have the opportunity to be heard on a jury for the government to prove the facts or they're going to take the defendant [27] beyond the maximum to a jury and let the jury decide. I think that that's the essence of Apprendi.

THE COURT: What I'm going to do is this. I'm going to put this matter over and to give you some additional time to look at the authorities that you were just given and to perhaps argue further on the point. Given the amount of exposure that Mr. McMurtry has at this stage I think it is only reasonable and fair that I do that and I would like to hear further from the government as well.

I will tell you that another reason is right now I am in a time crunch. There is another case here for another

sentencing and there are other matters I have people waiting in the back on another matter as well. So this will certainly give me a chance to have the benefit of your further study of the issue.

And I think it's only fair that this matter get a full hearing before final disposition so let's put it over to next week.

* * *

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,	)	CASE NO.
Plaintiff,	)	00-CR-161
v.	)	
MICHAEL McMURTRY,	)	
Defendant.	)	

HONORABLE CHARLES N. CLEVERT
PRESIDING DISTRICT COURT JUDGE

MILWAUKEE, WISCONSIN APRIL 26, 2001

CONTINUED SENTENCING PROCEEDINGS
HELD IN THE ABOVE-ENTITLED MATTER

[2] PROCEEDINGS

(Morning proceedings commenced at 9:00 a.m.)

THE CLERK: Case number 2000-CR-161, United States of America v. Michael McMurtry. This matter's before the Court for continued sentencing. May we have the appearances, please.

MS. LAWRENCE: The United States by Lisa Lawrence. Good morning, Your Honor.

THE COURT: Good morning.

MS. JOSEPH: Good morning, Your Honor. Michael McMurtry appears in person with Attorney Nancy Joseph.

THE COURT: Good morning to you as well. Good morning, Mr. McMurtry.

THE DEFENDANT: Good morning, Your Honor.

THE COURT: When we were last here to consider sentencing the Court gave to the parties an opportunity to file supplemental briefs. The Court has not received anything since the hearing and, therefore, concludes that the parties are not desirous of supplementing the record.

I do wish to note a decision which was handed down on April 20th. United States of America versus Michael Lamarre, L-a-M-a-r-r-e. It is case number 2000-2440 out of the Seventh Circuit Court of Appeals. I do not have a Westlaw citation or Federal Third citation. However, that case which came out of the Western District of Wisconsin is one where the Court dealt [3] with several issues. One was expert testimony and the Daubert analysis, and another issue related to sentencing and Apprendi.

The Court said near the end of the decision the following. And I quote, "Finally, Michael challenges his sentence. He argues that he was entitled to have the facts upon which the District Court enhanced his criminal history found by the jury beyond a reasonable doubt under Apprendi versus New Jersey, 530 U.S. 466 (2000). He does not challenge the District Court's decision to enhance his criminal history category. Michael did not raise his Apprendi argument at sentencing so we review it only for plain error."

Citing United States versus Jackson 236 F. 3d 886 and 887 (Seventh Circuit, 2001), as well as United States versus Nance, 236 F. 3d 820, 824, 825 (Seventh Circuit, 2001).

"But regardless of the scope of our review our cases compel us to reject his argument. Apprendi holds that any fact (except the existence of a prior conviction) that increases a sentence beyond the statutory maximum for the particular offense must be submitted to the jury and proved beyond a reasonable doubt." Jackson 236 F. 3d at 887. "Michael's sentence does not exceed the maximum term for bank fraud." And it goes on to cite 18 USC 1344.

So I wanted to make sure that you were aware of this particular case if it had not previously come to your [4] attention as it relates to the Apprendi argument considered the last time we were here.

Do the parties wish to be heard further with regard to any issue with regard to the presentence report and the guideline application?

MS. LAWRENCE: Not from the Untied States, Your Honor.

MS. JOSEPH: Your Honor, yes, on behalf of Mr. McMurtry. I guess I want to clarify an issue that the Court went over at the last hearing. The Court said that the Court was puzzled by the fact that Mr. McMurtry did not take up the Court's offer to use an expert to look at the gun. Only because the court was puzzled by that I think the answer I gave at the last hearing was unsatisfactory in that I said that I was not the attorney during the trial. That remains to be true.

But I do recall, Your Honor, that I was sitting in the back during the motions which were filed by Attorney Rebholz and I wanted to refresh the Court's memory that Mr. McMurtry had asked the same question of the Court, the question with regards to, you know, why didn't Mr. Rebholz take up the Court's offer to make use of the expert. I don't want the hearing to be about that motion to withdraw, but I did want to refresh the Court's recollection on that.

THE COURT: I do now recall that that discussion did [5] take place and I still remain somewhat curious, but that's beside the point at this juncture. Obviously it's not a sentencing factor nor a matter that has any consequence as far as the guideline application is concerned or the question of whether or not Mr. McMurtry had accepted responsibility. But it is just a curious circumstance in light of the arguments that have been advanced in connection with this case.

Putting all that aside, are you desirous of being heard any further on these matters?

MS. JOSEPH: Your Honor, just very briefly on the Apprendi issue. I did not submit anything in writing because I did not find any additional cases. But we had left off the hearing at the last time when the Court had brought to our attention the Mack case from the Third Circuit. And I just wanted to point out to the Court that I believe that the Mack case can be distinguished, is distinguishable from the case at hand.

I believe the defendant in Mack, his argument was on the notice issue. He did not take it to the point I believe that is appropriate here, that is, not just the notice, it's

also that it was not in the indictment, it was not submitted to the jury and because the facts of his predicate offenses in the armed career criminal do, in fact, take the sentence beyond the ten years which is the maximum I do believe that Apprendi's applicable.

[6] I've heard the Court's statements. I know the difficulty in my argument is the fact that we are talking about prior convictions. However, I also believe even with that, Your Honor, there is authority, I believe, for Apprendi that this prior conviction exception should be read very narrowly in light of Almendarez-Torres where that defendant had admitted to the prior convictions and that defendant's challenge was a narrow challenge on the sufficiency of the indictment. So I want the record to be supplemented with that.

THE COURT: Your argument is duly noted. Does the government wish to comment on that argument?

MS. LAWRENCE: Only that as the Court indicated at the last hearing and as I responded in my brief to the objections offered by defendant's counsel Apprendi precludes proving predicate convictions beyond a reasonable doubt.

In addition with respect to notice, the defendant did receive notification informally through the probation department in one of the pretrial services' report as well as through counsel. I had conversations with Attorney Rebholz regarding the applicability of the armed career criminal act to the defendant.

THE COURT: The Court does acknowledge the arguments of counsel. The Court nonetheless believes that the presentence report is correct as written and does, therefore, [7] adopt the guideline applications. Accordingly the Court makes the following finding. The defendant's offense level is 33 with a criminal history category of six. The sentencing range is from 235 to 293 months. With at least three but not more than five years of supervised release. The fine range is from 17,500 to $175,000. And there is a mandatory special assessment of $100.

We move now to sentencing. I like to hear from the government.

* * *

APPENDIX C

18 U.S.C. § 922(g)(1)

It shall be unlawful for any person –

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

* * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

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18 U.S.C. § 924(e)(1)

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).